

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA, et al.,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 05-CV-00329-TCK-SAJ</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO  
"BEV SAUNDERS' MOTION FOR PROTECTIVE ORDER"**

COMES NOW the Plaintiff, the State of Oklahoma, *ex rel.* W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, (hereinafter "the State"), by and through counsel, and in response to "Bev Saunders' Motion for Protective Order" [Dkt. # 957] states that the requisite good cause for the requested protective order does not exist and therefore Mrs. Saunders' motion should be denied in its entirety.

**I. Background**

Defendant Peterson Farms, Inc.'s Rule 26(a)(1) initial disclosures in this case states that Mrs. Saunders has the following information pertaining to this case: "Poultry growers' obligations under applicable laws, compliance therewith, farm operations and litter management, and relationship with Peterson." *See* Exhibit 1, Item 91.

Mrs. Saunders has also appeared in print advertising running in Oklahoma stating the following:

Bev Saunders. Oklahoma Farmer. Farmers learn a lot from their dads. Most importantly, they learn integrity. That's why it's so surprising to hear the Attorney

General accuse poultry farmers of breaking the law when it comes to applying poultry litter as fertilizer to their land. Truth is, they're only applying what the law allows. If there's any left, they sell it to others, like cattlemen, who use it to help grow hay for their cattle. It's just one of many things the industry is doing to help our environment. The farmers. The companies. Working together.

Exhibit 2 (from Poultry Community Council website found at <http://www.oklahomapoultry.org>).

Nothing in this advertising limits its content to poultry industry activities or conduct solely outside the Illinois River Watershed. In fact, the advertising is implicitly (at the very least) referring to poultry industry activities or conduct within the Illinois River Watershed. *See*, Exhibit 2 ("it's so surprising to hear the Attorney General accuse poultry farmers of breaking the law").

Additionally, for several years earlier this decade Mrs. Saunders, with her husband, was a licensed poultry grower for Defendant Peterson Farms, Inc., with poultry growing operations in the Illinois River Watershed. *See* Exhibit 3.

Plainly, Mrs. Saunders has information reasonably calculated to lead to the discovery of admissible evidence in this case. Not only has Defendant Peterson Farms identified Mrs. Saunders as an individual with information relevant to issues in this case, but also Mrs. Saunders herself has publicly held herself out as an individual with knowledge of, *inter alia*, (1) the Oklahoma poultry industry's -- including that part of the Oklahoma poultry industry located in the Illinois River Watershed -- purported compliance with the law with regard to the land application of poultry waste, (2) the Oklahoma poultry industry's -- including that part of the Oklahoma poultry industry located in the Illinois River Watershed -- conduct with respect to the handling of "excess" poultry waste, and (3) the poultry industry's purported efforts "to help our environment" -- including the environment located in the Illinois River Watershed.

A central claim of the State's First Amended Complaint is that the improper handling and disposal of poultry waste for which the poultry industry is legally responsible has caused an environmental injury to those portions of the Illinois River Watershed located in Oklahoma. *See, e.g.,* First Amended Complaint, ¶ 1.

In light of the foregoing, the State, on September 27, 2006, issued subpoenas to Mrs. Saunders for a deposition and for documents related to these matters. The subpoena discloses that Mrs. Saunders' deposition will be videotaped. *See* Saunders' Motion, Ex. 3. Mrs. Saunders has not filed any objections to the relevancy, scope or the propriety of the State's discovery. *See, e.g.,* Saunders' Motion, p. 5 ("Mrs. Saunders has no desire to delay the taking of her deposition"). Rather, on October 27, 2006, Mrs. Saunders moved for a protective order precluding the State from videotaping the deposition or, alternatively, "from utilizing or publishing Mrs. Saunders' image and / or voice, without her written consent, anywhere or in any way other than in litigation." Saunders' Motion, p. 2. The stated basis for her motion is that she needs protection "from humiliation, oppression, embarrassment, or from being cast in a false light by Plaintiff's publication of her video deposition testimony." Saunders' Motion, p. 4.

## **II. Legal Standard**

### **A. Videotaping of depositions**

"The Federal Rules of Civil Procedure explicitly provide that depositions may be conducted by videotaping." *Fanelli v. Centenary College*, 211 F.R.D. 268, 269 (D. Kan. 2002) (citing Fed. R. Civ. P. 30(b)(2)). "Indeed, courts have long held that 'the use of videotaped testimony should be encouraged and not impeded because it permits the jury to make credibility evaluations not available when a transcript is read by another.'" *Fanelli*, 211 F.R.D. at 270 (citation omitted). In order to overcome this expressed preference for videotaped depositions, a

party may move for a protective order. *Fanelli*, 211 F.R.D. at 270. The movant bears the burden of persuasion on a motion for protective order, and the standard is "good cause." *Fanelli*, 211 F.R.D. at 270; Fed. R. Civ. P. 26(c). "[G]ood cause is established on a showing that disclosure [here, videotaping] will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity.' Good cause cannot be established upon some general or speculative alleged harm." *Fanelli*, 211 F.R.D. at 270 (emphasis added in *Fanelli*) (citation omitted); *Wilson v. Olathe Bank*, 184 F.R.D. 395, 397 (D. Kan. 1999) ("To establish good cause, that party must submit 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements'" (citation omitted)).

#### **B. Dissemination of discovery**

"[P]arties to litigation have a constitutionally protected right to disseminate information obtained by them through the discovery process absent a valid protective order." *Oklahoma Hospital Association v. Oklahoma Publishing Company*, 748 F.2d 1421, 1424 (10th Cir.1985) (citation omitted). "The mere fact that some level of discomfort, or even embarrassment, may result from the dissemination of [a deponent's] deposition testimony is not in and of itself sufficient to establish good cause to support the issuance of protective order. To rise to a level of good cause, any such embarrassment must be substantial." *Flaherty v. Seroussi*, 209 F.R.D. 295, 299 (N.D.N.Y. 2001). Further, "[i]n cases where issues of strong public interest favoring the free dissemination of discovery materials are at play, the normal practice of not according discovery materials the same degree of access as those filed in connection with trial gives way to a presumption of open inspection." *Flaherty*, 209 F.R.D. at 299.

### III. Argument

Mrs. Saunders' arguments in support of the issuance of a protective order are conclusory and speculative in nature, and do not establish the requisite good cause for the requested relief.

#### A. **Mrs. Saunders has failed to establish that "good cause" exists for issuance of a protective order precluding the State from videotaping her deposition**

Mrs. Saunders argues that "there is no good reason for Plaintiff to depose Mrs. Saunders, other than for the purpose of punishing her for speaking out against the present litigation and to discourage other individuals from speaking out." Saunders' Motion, p. 3; *see also* Saunders' Motion, p. 4. Mrs. Saunders is simply wrong. Very good reasons exist for taking her deposition. As noted above, Defendant Peterson Farms has listed Mrs. Saunders on its Rule 26(a)(1) initial disclosures as an individual with information pertaining to issues in this lawsuit. Further, Mrs. Saunders has publicly held herself out as an individual with knowledge of, *inter alia*, (1) the Oklahoma poultry industry's -- including that part of the Oklahoma poultry industry located in the Illinois River Watershed -- purported compliance with the law with regard to the land application of poultry waste, (2) the Oklahoma poultry industry's -- including that part of the Oklahoma poultry industry located in the Illinois River Watershed -- conduct with respect to the handling of "excess" poultry waste, and (3) the poultry industry's purported efforts "to help our environment" -- including the environment located in the Illinois River Watershed. The State is plainly permitted to inquire as to Mrs. Saunders' knowledge on these issues, as well as the basis of this knowledge, since these topics are core issues in the State's lawsuit against the Poultry Integrator Defendants. The discovery of Mrs. Saunders sought in State's subpoenas is thus clearly relevant and legitimate. This clear relevance and legitimacy thoroughly discredits Mrs. Saunders' conclusory, wholly unsubstantiated, and wildly speculative assertions that the purpose

of the deposition is to "punish[] her."<sup>1</sup> The fact of the matter is that Mrs. Saunders has provided no evidence that videotaping the deposition will humiliate her, will oppress her, will embarrass her or result in her being cast in a false light. *See Fanelli*, 211 F.R.D. at 270 ("Good cause cannot be established upon some general or speculative alleged harm"); *Wilson*, 184 F.R.D. at 397 ("To establish good cause, that party must submit 'a particular and specific demonstration of fact . . ."). Simply put, good cause precluding the videotaping of Mrs. Saunders at her depositions has not been established.

**B. Mrs. Saunders has failed to establish that "good cause" exists for issuance of a protective order precluding the State from using or publishing Mrs. Saunders' image and / or voice, without her written consent, anywhere or in any way other than in litigation**

Not only has she failed to establish good cause for a protective order precluding the State from videotaping her deposition, but also Mrs. Saunders has failed to establish good cause for a protective order precluding the State from disseminating the videotape of the deposition should the State one day decide to do so. Mrs. Saunders has failed to come forward with any specifics why, were it to in fact occur, dissemination of the videotape of the deposition would cause her embarrassment, let alone "substantial" embarrassment. Nor has Mrs. Saunders specified or explained why or how dissemination of the videotape of the deposition would oppress her or

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<sup>1</sup> Mrs. Saunders cannot seriously contend that the State's document requests are evidence of an intent to "punish" her. Indeed, she has not even objected to them. The State's document requests are 2½ pages and contain 25 carefully described categories of information. The categories can be broken down into roughly three groupings. The first grouping seeks documents pertaining to the Saunders' own poultry growing operations and poultry waste disposal practices. *See* Subpoena Request Nos. 1, 2, 3, 4, 5, 6a, 7, 8, 9a, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22. The second grouping seeks documents pertaining to Mrs. Saunders' claimed knowledge as to the conduct and practices of the Oklahoma poultry industry -- including that part of the Oklahoma poultry industry located in the Illinois River Watershed. *See* Subpoena Request Nos. 6b & 9b. The third grouping seeks documents underlying or pertaining to Mrs. Saunders' public statements about poultry and poultry waste and to documents pertaining to communications with organizations dealing with poultry-related issues. *See* Subpoena Request Nos. 23, 24 & 25.

portray her in a false light. Mrs. Saunders' assertions are all entirely conclusory and speculative in nature. Accordingly, good cause for issuance of protective order has not been established. *See Flaherty*, 209 F.R.D. at 299.

Further weighing against a protective order precluding dissemination of the videotape of the deposition is the fact that the issues raised by this litigation, and the issues to be addressed in this deposition, are ones of "strong public interest." *See Flaherty*, 209 F.R.D. at 299. It is beyond dispute that the public has a strong interest in being informed about issues pertaining to pollution of the environment, the health risks associated with that pollution, and the activities that are causing that pollution. In sum, contrary to Mrs. Saunders' suggestion, nothing nefarious can or should be read into the State's refusal to agree not to disseminate the videotape of her deposition.

#### **IV. Conclusion**

WHEREFORE, premises considered, "Bev Saunders' Motion for Protective Order" [Dkt. # 957] should be denied in its entirety.

Respectfully Submitted,

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